Supreme Court, U.S.
FILED
AUG 2 8 2004
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(11) (8)

Nos. 03-1164 & 03-1165

IN THE

Supreme Court of the United States

ANN VENEMAN,
Secretary United States Department of Agriculture, *et al.*,

Petitioners,

- and -

NEBRASKA CATTLEMEN, INC., *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF STATE OF FLORIDA, DEPARTMENT OF CITRUS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* STATE OF FLORIDA, DEPARTMENT OF CITRUS[1]

Florida's Interest in the Case at Bar

The State of Florida, Department of Citrus ("Florida"), has a vital interest in the case at bar because the outcome has potential implications reaching far beyond the beef industry. Florida citrus is an industry that employs over 90,000 people and represents a $9 billion positive impact on Florida, making it crucial to Florida's economic welfare. As consistently recognized by this and other courts considering the question, Florida's interest in protecting and preserving the industry is paramount. Unless this case is properly analyzed pursuant to existing United States Supreme Court precedent, Florida's citrus advertising campaign, which is vitally important to the economic welfare of the State of Florida and its citrus industry, may be jeopardized.

In the matter at hand, the Court has an opportunity to clarify confusion created by lower courts that have seized upon the notion of a "collectivized" industry as that term is used by this Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997), as the sole route

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1. Pursuant to Rule 37.6 of the Supreme Court Rules, *amicus curiae* states that counsel for a party has not authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. All parties to this proceeding have provided written consent to the filing of this brief and such written consents are filed herewith.

to constitutionality.[2] The issue in *United Foods* and *Glickman* was not *collectivization* but *regulation*. Included among the courts that have misapprehended United States Supreme Court precedent in this regard, and also as to what constitutes government speech, is a Florida trial court whose decision regarding Florida's citrus advertising campaign is currently on appeal.[3]

As *amicus curiae* in this case, Florida also seeks to call to the attention of the Court that the Florida citrus industry has circumstances which are unique and different from the facts reviewed in *United Foods* and its progeny,[4] including the matter at hand. No matter what the Court's decision in this case, it is Florida's endeavor to bring to the Court's attention the need to include language in its decision protecting governmental entities such as Florida that fall squarely within the protections afforded by *United Foods* and *Glickman*.

Also, the case at bar presents an opportunity for the Court to ameliorate confusion and clarify the difference between generic agricultural assessment programs which fund speech by non-governmental or quasi-governmental industry groups

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2. *See, e.g., Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423 (5th Cir. 2004); *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004); *Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895 (9th Cir. 2003); *Summit Medical Ctr. of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350 (M.D. Ala. 2003); *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290 (E.D. Wash. 2003).

3. *State of Florida, Department of Citrus v. Graves Bros. Co.*, No. 2D03-2276 (Fla. Dist. Ct. App. 2d 2004).

4. *See* note 2, *supra*.

for the collective benefit of contributing producers, and advertising disseminated by the government itself as part of an overall regulatory scheme which advances a substantial governmental interest.

Florida's Interest in the Issue of Compelled Funding for Generic Advertising

It is in Florida's interest to take necessary measures to maintain the health of the citrus industry and to maintain a favorable atmosphere for its continued prosperity in order to protect the economic welfare of the State of Florida as a whole. This end is achieved by regulating the quality of Florida's citrus and as such, Florida has in place a complex, pervasive and expansive regulatory scheme, the purpose of which is to ensure and promote the high quality and wholesomeness of Florida citrus products.

Florida's history of regulating the citrus industry extends back to 1935 when the Florida Legislature enacted what is now Chapter 601 of the Florida Statutes, known as the Florida Citrus Code. Therein, the Department of Citrus was created to carry out the Citrus Code's provisions. The Department of Citrus is headed by the Florida Citrus Commission, which is appointed by the Governor and confirmed by the Florida Senate.

The Legislature established as part of Florida's broader regulatory scheme an excise tax under Section 601.15, Florida Statutes (2003), commonly referred to as Florida's "Box Tax." The tax is assessed against every box of citrus that enters the primary channel of trade in Florida. A portion of the revenue generated by the tax is used to fund a legislatively mandated advertising campaign, through which

information is disseminated to the consuming public regarding the quality of Florida's citrus and the lengths to which Florida goes to ensure the quality of its citrus and to ensure that the State's high standards are consistently and reliably maintained.[5]

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5. By enacting Section 601.15, Florida Statutes (2003), the Florida Legislature mandated an advertising campaign, to be conducted as follows: "The Department of Citrus shall plan and conduct campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage noncommodity advertising, to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service." § 601.15(2), Fla. Stat. (2003). The Legislature included in the statute a chart for calculating the amount of the tax. § 601.15(3), Fla. Stat. (2003). To accomplish its legislative mandate, the Department of Citrus expressly is empowered and obligated to promote the use of a "distinctive and suggestive trade name . . . to advertise Florida citrus," § 601.15(2)(b), Fla. Stat. (2003), and to disseminate information regarding Florida citrus as follows:

> 1. Citrus fruits and the importance thereof in preserving the public health, the economy thereof in the diet of the people, and the importance thereof in the nutrition of children;
>
> 2. The manner, method, and means used and employed in the production and marketing of citrus fruits and information relating to laws of the state regulating and safeguarding such production and marketing;
>
> 3. The added cost to the producer and dealer in producing and handling citrus fruits to meet the high standards imposed by the state that ensure a pure and wholesome product;
>
> 4. The effect upon the public health which would result from a breakdown of the Florida citrus industry or any part thereof;

(Cont'd)

The advertising campaign is only one component of, though essential to, a comprehensive regulatory scheme. Indeed, the regulatory scheme touches upon every aspect of the industry, ensuring that Florida's high standard for its citrus is safeguarded, including: advertising (§ 601.15, Fla. Stat.); production, marketing and price stabilization; (§ 601.154, Fla. Stat.); boxing (§ 601.85-88, Fla. Stat.); disease control (§§ 581.181, 581.184, Fla. Stat.); dyes or coloring (§§ 601.75-77 & 601.80, Fla. Stat.); canning and concentrating (§ 601.36, Fla. Stat.); fertilizing (§ 601.92, Fla. Stat.); harvesting (§ 601.10, Fla. Stat.); grading (§ 601.45, Fla. Stat.); inspections and seizure of immature

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(Cont'd)

> 5. The reasons why producers and dealers should receive a reasonable return on their labor and investment;
>
> 6. The problem of furnishing the consumer at all times with an abundant supply of fine quality citrus fruits at reasonable prices;
>
> 7. Factors of instability peculiar to the citrus fruit industry, such as unbalanced production, the effect of weather, the influence of consumer purchasing power, and price relative to the cost of other items of food in the normal diet of people, all to the end that an intelligent and increasing consumer demand may be created;
>
> 8. The possibilities with particular reference to increased consumption of citrus fruits; and
>
> 9. Such other, further, and additional information which tends to promote increased consumption of citrus fruits and which fosters a better understanding and more efficient cooperation among producers, dealers, and the consuming public.

§ 601.15(2)(a), Fla. Stat. (2003).

or unwholesome fruit (§§ 601.27-29, 601.44, 601.54, Fla. Stat.); juicing and the use of sweeteners (§§ 601.9914 & 601.9916, Fla. Stat.); labeling (§§ 601.9905, 601.9907-9909, 601.9913, Fla. Stat.); licensing (§§ 601.55-60, Fla. Stat.); maturity standards (§§ 601.16-25, Fla. Stat.); packaging (§§ 601.40-42, Fla. Stat.); shipping (§ 601.85, Fla. Stat.); testing (§§ 601.24, 601.25, 601.43, 601.96, Fla. Stat.); and transportation (§§ 601.51-52, 601.731, Fla. Stat.).

The costs associated with the comprehensive regulatory scheme have exceeded $80 million annually, of which the generic advertising campaign expenditure is a small fraction. The regulatory scheme is designed to ensure that the quality of Florida's citrus remains at the highest level. The statutes and regulations implementing it are intended to establish Florida citrus products as the preeminent standard of quality, similar to French and California wines. The advertising campaign is ancillary to the broader regulatory scheme, and necessary for its success. It is designed to maintain strong public demand for citrus products identified with the State of Florida.

SUMMARY OF ARGUMENT

Controlling United States Supreme Court precedent establishes that compelling contributions to fund an advertising campaign is constitutional when the contribution is part of a broader regulatory scheme that is germane to a substantial governmental interest. *United Foods,* 533 U.S. at 415-417, 121 S. Ct. at 2340-41 (holding unconstitutional an advertising fee not connected with any regulatory scheme); *Glickman,* 521 U.S. at 458-59, 117 S. Ct. at 2132-33 (upholding an advertising fee that was one part of a pervasive regulatory scheme). The issue is not *collectivization* but

regulation. Even if the Court concludes that the case at bar should be affirmed, it should tailor its decision to carve out governmental entities, such as Florida, which have extensive regulatory schemes that clearly fall within the protective ambit of *United Foods* and *Glickman*.

Also, advertising funded by state taxes, such as Florida's Box Tax, is patently government speech where such advertising is disseminated by a government entity and the government entity exercises complete authority, control, and responsibility for the message conveyed, especially where the message conveyed is part of an overall regulatory scheme which advances a substantial governmental interest.

ARGUMENT

I. A Compelled Contribution to Fund a Generic Advertising Campaign is Constitutional if it is an Integral Part of a Broad Regulatory Scheme Germane to a Substantial Governmental Interest

In *Glickman*, this Court upheld an assessment imposed against growers, handlers and processors of California tree fruits under marketing orders promulgated by the Department of Agriculture. 521 U.S. at 477, 117 S. Ct. at 2142. The funds collected were used to pay for the expenses associated with administering the orders, "including specific projects undertaken to serve the economic interests of the cooperative producers," "joint research and development projects," and "generic advertising" of California nectarines, plumbs and peaches. *Id.* at 460-61, 117 S. Ct. at 2134.

In determining the constitutionality of the assessment, the Court "stress[ed] the importance of the statutory context" in which the assessment arises, as follows:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

Id. at 469, 117 S. Ct. at 2138. The Court, observing that its prior decisions "provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group," *id.* at 472-73, 117 S. Ct. at 2140, concluded that:

> Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and

> consistent with the regulatory goals of the overall statutory scheme.

Id. at 476, 117 S. Ct. at 2141.

The Court revisited the issue in *United Foods*, reviewing a First Amendment challenge to marketing orders promulgated by the Department of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act. The purpose of the Act was to maintain and expand existing markets and uses of mushrooms, and to improve Americans' eating habits and benefit the environment. 7 U.S.C. § 6101. The Act allowed the department to fund those efforts by imposing assessments on mushroom growers. 7 U.S.C. § 6104(g).

Observing that the department used the collected money almost exclusively for generic advertising, 533 U.S. at 409, 121 S. Ct. at 2337, the Court determined that the marketing orders violated First Amendment protections, distinguishing the mushroom orders there at issue from the marketing orders upheld in the earlier *Glickman* decision, as follows:

> The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

533 U.S. at 411-12, 121 S. Ct. at 2338-39. The Court in *United Foods* furthermore explained that, whereas in

Glickman the growers' "mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation," in *United Foods*, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412, 121 S. Ct. at 2339. In effect, "the principal object" of the compelled contribution is the advertising itself, and is not "germane to a purpose related to an association independent from the speech itself." *Id.* at 415, 121 S. Ct. at 2340-41.

Essentially, whereas in *Glickman* the assessments used to finance commercial speech were but a part of a more comprehensive regulatory program, in *United Foods* the advertising was the whole point of the regulation, giving rise to a First Amendment challenge. Finding that "it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place" and that no such purpose existed in the context of the mushroom marketing order, the Court determined that the assessments violated First Amendment protections. *Id.* at 413, 417, 121 S. Ct. at 2340-41.

The precedential value of *Glickman* is thus neither eliminated nor emasculated by the Court's subsequent decision in *United Foods*. Rather, the language of *United Foods* identifies a First Amendment boundary between compelled contributions for advertising under a regulatory scheme aimed exclusively at such advertising and similar contributions under more expansive regulatory programs. According to the Court, the former deserves protection, while the latter does not. In short, the Court's decision in *United Foods* therefore does not represent a significant retreat from the earlier-established deference granted to a

governmental regulatory scheme compelling commercial speech.

Both *Glickman* and *United Foods* relied upon this Court's body of First Amendment decisions most prominently set forth in *Keller v. State Bar of California,* 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), and *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), both of which required that subsidized speech be germane to a substantial state interest that justified the regulation of the industry in the first place.

In *Abood*, a teachers' union had a collective bargaining agreement which maintained a provision that the school district would be an "agency shop," so that any teacher who refused to join the union was required to pay a "service charge equal to the regular dues" paid by union members. 431 U.S. at 212, 97 S. Ct. at 1788. The Court determined that requiring the union to represent all employees did not violate the Constitution, but that spending some of the money the employees were required to contribute on political and ideological matters unrelated to collective bargaining violated First Amendment protections. *Id.* at 235-37, 97 S. Ct. 1799, 1800. Thus, while the Court found no violation with the teachers being required to pay union dues, the Court found that the fact that the dues were spent for political purposes unrelated to the union's purpose made the mandatory funding unconstitutional. *Id.*

In *Keller,* the Court clarified the *Abood* rule, explaining that it requires that activities funded from mandatory dues must be "germane" to the purpose for which the compelled association is justified. 469 U.S. at 13, 110 S. Ct. at 2236. In *Keller,* the members of the California State Bar Association

alleged that mandatory attorney's dues constituted compelled funding of speech in violation of the First Amendment because the Bar allegedly used the money it collected in dues to finance lobbying efforts in the state legislature respecting gun-control and nuclear weapons freeze causes, filing *amicus* briefs in pending cases and speaking out against political candidates. *Id.* at 5, 15-16, 110 S. Ct. at 2231, 2236-37. The Bar, of course, also examined applicants for admission, formulated rules of professional conduct, disciplined members for misconduct, and engaged in other activities to improve the administration of justice. *Id.* at 5, 110 S. Ct. at 2231. In determining the constitutionality of the compelled funding of speech, the Court explained:

> [T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, fund activities of an ideological nature which fall outside those areas of activity.
>
> * * *
>
> Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

Id. at 14, 110 S. Ct. at 2236.

In both *United Foods* and *Glickman*, the Court equated the "overriding associational purpose" present with the union in *Abood* and the state bar in *Keller* with the mushroom and tree fruit marketing orders. *United Foods*, 533 U.S. at 413-15, 121 S. Ct. at 2339-2341; *Glickman*, 521 U.S. at 473, 117 S. Ct. at 2140. In *Glickman*, the Court held that the tree fruit promotion program was germane to the justified associational purpose of the broader economic regulation. In *United Foods*, however, the Court observed that, unlike in *Glickman*, the mushroom marketing orders did not exist alongside other forms of economic regulation and served only to fund the advertising. The notable absence of a broader regulatory scheme in *United Foods* prompted the Court's determination that the compelled funding was unconstitutional.

The notion of "collectivization," as used by this Court in both *Glickman* and *United Foods*, merely represents a characterization of the comprehensive regulatory scheme's effect. It is *not* an essential constitutional criterion. The core of the Supreme Court's decision in *Glickman*, as restated in *United Foods*, concerned whether the mandatory assessment was ancillary to a pervasive regulatory scheme and whether the funds collected pursuant to the program there under review were used to further its purpose. In *Glickman*, of course, it happens that the subject industry was, or was authorized to be, collectivized. But the Court's consideration of that fact did not alter the constitutional analysis by adopting "collectivization" as a constitutional requirement. Any conclusion to the contrary ignores the fact that the *Glickman* decision expressly relied upon *Keller*, in which the Court had recognized the validity of California's compelled bar dues, so long as they were expended on germane purposes, despite the fact that California lawyers

certainly are not economically collectivized. The issue is not *collectivization,* but *regulation.*

Hence, compelling contributions to fund an advertising campaign is constitutional when the compelled contribution is part of a broader regulatory scheme that is germane to a substantial governmental interest. Some industries, such as Florida's citrus industry, operate under regulatory schemes which are far more comprehensive than the non-existent regulatory scheme considered in *United Foods,* or the limited regulatory schemes considered in some post-*United Foods* federal district and appellate court decisions.[6] As such, even if the Court concludes that the decision below should be affirmed, it should tailor its decision to carve out entities such as Florida, that clearly fall within the protective ambit of *United Foods* and *Glickman.*

II. The Speech Funded by Florida's Box Tax Constitutes Government Speech

In *United Foods,* this Court reserved ruling on the issue of government speech. 533 U.S. at 416-17, 121 S. Ct. at 2341. The gravamen of the government speech doctrine is that the government is free to make value judgments to convey particular messages without being subject to challenges based upon the First Amendment. *See, e.g., Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep't of*

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6. Florida's regulation of its citrus industry is also more extensive than California's regulation of its lawyers.

Motor Vehicles, 288 F.3d 610 (4th Cir. 2002); *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001), *cert. denied*, 534 U.S. 997, 122 S. Ct. 469, 151 L. Ed. 2d 384 (2001); *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S. Ct. 1168, 107 L. Ed. 2d 1070 (1990). It is well established, of course, that the "government is entitled to promote particular messages . . . [and] its policies and positions either through its own officials or through its agents." *Sons of Confederate Veterans, Inc.*, 288 F.3d at 616-17 (citing *Rust*, 500 U.S. at 194, 111 S. Ct. 1759).

In *Knights of Ku Klux Klan v. Curators of the University of Missouri*, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814, 121 S. Ct. 49, 148 L. Ed. 2d 18 (2000), the court recognized that government speech may be identified based upon the central purpose of the program, the degree of editorial control exercised by the government over the content of the message, and whether the government bears the ultimate responsibility for the content of the message. 203 F.3d at 1093-94 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)).

To the same effect is *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994, 121 S. Ct. 1653, 149 L. Ed. 2d 636 (2001), in which the court determined that when the government speaks, "its control of its own speech is not subject to the constraints of constitutional safeguards and form analysis, but instead is measured by practical considerations applicable

to any individual's choice of how to convey one's self." *Id.* at 1013.[7]

In the case at bar, the Eighth Circuit recognized that:

> The government is constitutionally entitled to engage in its own speech without implicating the First Amendment. As this Court has recognized, [t]he First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression.

Livestock Marketing Ass'n v. United States Dept. of Agriculture, 335 F.3d 711, 718 (8th Cir. 2003) (citations and internal quotations omitted), *cert. granted in part,* 124 S. Ct. 2389, 2390, 158 L. Ed. 2d 962 (2004).

In *Pelts & Skins, LLC v. Landreneau,* 365 F.3d 423 (5th Cir. 2004), despite finding that the use of fees in Louisiana for the generic marketing of alligator meat and skins violated the First Amendment, the Fifth Circuit importantly recognized that it was not reviewing advertising disseminated by a governmental entity exercising complete authority,

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7. In formulating its opinion, the Ninth Circuit in *Downs* relied upon the decisions of this Court in *National Endowment for the Arts v. Finley,* 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998), *Board of Regents of the University of Wisconsin v. Southworth,* 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), *Rosenberger,* 515 U.S. 819, 115 S. Ct. 2510, *Rust,* 500 U.S. at 173, 111 S. Ct. at 1759, and *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

control and responsibility for the message conveyed as part of a broad regulatory scheme, such as Florida's citrus advertising campaign:

> Nor are we dealing with a governmental message crafted, controlled, and expressed by an agency designed to represent state government.

365 F.3d at 432 (relying on the government speech doctrine as espoused by this Court in *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) and *Southworth,* 529 U.S. 217, 120 S. Ct. 1346).

This Court specifically recognized in *Keller* that its finding of a First Amendment violation would be different if the State Bar of California were:

> [A] "government agency," and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance. . . . The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies."

496 U.S. at 11, 110 S. Ct. at 2234. Likewise, this Court recognized that its decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed 2d 193 (2000), would be "altogether different" had the university itself been the speaker:

> The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play. When the government

> speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

529 U.S. at 235, 120 S. Ct. at 1357.

Therefore, when advertising is disseminated by a governmental entity and such advertising promotes a governmental message and the advertising is completely within such entity's control, authority, and responsibility, it should properly be characterized as government speech.

The Florida Legislature expressly established the Department of Citrus as an agency of the State and mandated that the Department of Citrus shall speak for the State on citrus related matters.[8] The Florida Legislature also mandated an advertising campaign to be conducted by the Department of Citrus as follows: "The Department of Citrus shall plan

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8. The Legislature sets out the organizational structure for the executive branch of Florida's government in Chapter 20 of the Florida Statutes, and creates therein State agencies under the powers granted by Article IV, Section 6, of the Florida Constitution. § 20.02(2), Fla. Stat. (2003). The Department is specifically created as a State agency by Section 20.29, Florida Statutes (2003). The Department submits its budget annually to the Legislature for approval, is audited by the State, and its operations are governed by statute and overseen by the executive branch of Florida government and the Legislature. *See* §§ 20.051, 20.055 and ch. 601, Fla. Stat. (2003). The Department's employees all are: (i) employees of the State of Florida; (ii) paid by the State through the Chief Financial Officer; (iii) part of the State pension fund; and (iv) protected by sovereign immunity. *See* § 601.10, Fla. Stat. (2003).

and conduct campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage noncommodity advertising, to increase consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service." § 601.15(2), Fla. Stat. In addition, the Florida Supreme Court has specifically approved the Legislature's delegation of authority to the Department of Citrus to advertise and promote Florida citrus. *Coca-Cola Co. v. State Dept. of Citrus,* 406 So. 2d 1079, 1084 (Fla. 1981).

The promotion of Florida citrus, which is supported by funds collected under the Box Tax, has been legislatively and judicially determined to be crucial to the general economic welfare of the State of Florida. The Florida Supreme Court's decision in *Coca-Cola* affirmed a lower court decision which relied on this Court's consideration of the Citrus Code in *Sligh v. Kirkwood*, 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915):

> The regulation of the Florida citrus industry in the exercise of the state's police power has been upheld many times. *E.g., Sligh v. Kirkwood,* 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed 835 (1915); *L. Maxcy, Inc. v. Mayo,* 103 Fla. 552, 139 So. 121 (1932); *Mayo v. Polk Co., supra.* In *Sligh v. Kirkwood* . . . the United States Supreme Court observed that the police power, in its broadest sense, includes all legislation and almost every function of civil government. Most significantly, the court said "[the police power] embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health."

In that case the Court had under consideration a Florida statute making it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which were immature or otherwise unfit for consumption. The opponents of the statute contended that it was not a legitimate exercise of the police power because it had the effect of protecting the health of people in other states who might receive fruits from Florida in a condition unfit for consumption and, however commendable it may be to protect the health of such foreign peoples, that purpose is not within a state's police power. In upholding the statute, the Court said, in effect, that economic benefits are a legitimate purpose for the exercise of a state's police power:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in

> foreign markets, with the consequent beneficial effects upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

Florida Canners Ass'n v. State Dept. of Citrus, 371 So. 2d 503, 514 (Fla. 2d DCA 1979) (citing *Sligh*, 239 U.S. at 61, 35 S. Ct. at 503, 59 L. Ed. at 839), *aff'd*, 406 So. 2d 1079 (Fla. 1981). In addressing whether advertising constituted a valid objective for the exercise of police power, the court in *Florida Canners* further recognized that:

> The Florida Supreme Court had an early opportunity to consider the value to the Florida citrus industry of advertising Florida citrus fruit. *C.V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248 (1937). In that case the excise taxes levied by the three 1935 legislative enactments establishing the orange, grapefruit, and tangerine advertising funds were attacked on the ground that the tax was not a public purpose. The court held that it was, saying "it cannot be reasonably contended that the protection and promotion of the citrus industry in Florida is not a matter of public concern or that the legislature may not determine within reasonable bounds what is necessary for the protection and expedient for the promotion of that industry. We are committed to the theory that advertising is a proper method for promoting the

> public welfare and that, therefore, the tax levied to provide funds for advertising serves a public end."

Id. at 515.

The *United Foods* and *Glickman* requirement of a comprehensive regulatory scheme for agricultural commodity advertising campaigns has its roots in the substantial governmental interest in the agricultural industry sought to be regulated and advanced. Such a substantial governmental interest is never more clearly evidenced than by the government's valid exercise of its police powers to support, protect and advance such an industry for the welfare of the government. As shown in the cases cited above, Florida's substantial governmental interest in the Florida citrus industry has long been held to be a proper subject of the exercise of the Florida's police power. *See Coca-Cola and Florida Canners Ass'n, supra.* More especially, Florida's regulation of that industry for the purpose of advancing the economic well-being of the industry, and thereby of Florida, has been approved as being within the proper exercise of Florida's police power. *Id.*

As previously noted, Florida's advertising is only one part of the overall regulatory scheme in Florida which includes the Citrus Code, as well as its related statutes, rules and regulations, designed to insure the agricultural health of the citrus grower and the industry; assure that the consumers of fresh and processed citrus products receive high quality, safe, and health products; and assure that the regulation and promotion of those citrus products works to the economic advantage of the State of Florida as a direct result of the advancement of the economic health of its citrus industry.

Florida's advertising of Florida citrus is part of an overall regulatory scheme which advances a substantial state interest. Such advertising is completely within Florida's control, authority and responsibility. The advertising contains none of the limitations on government speech as set forth in federal case law. Therefore, in any decision or statement the Court makes in the instant case regarding government speech, the Court is respectfully urged to include language that clearly distinguishes the difference between generic agricultural assessment programs which fund speech by non-government or quasi-government industry groups for the collective benefit of contributing producers and advertising disseminated by the government itself as part of an overall regulatory scheme which advances a substantial governmental interest.

CONCLUSION

The court has an opportunity in this case to correct mischaracterizations of its decisions in *United Foods* and *Glickman*. Also, the Florida citrus industry has circumstances which are unique and different from the facts reviewed in *United Foods* and the post-*United Foods* cases. Thus, no matter what the Court's decision in this case, the Court is respectfully urged to include language in its decision protecting entities such as Florida that fall squarely within the protections afforded by *United Foods* and *Glickman*. The Court is also respectfully urged to include language in its decision to clarify that advertising disseminated by a government agency is government speech where the government agency exercises complete authority, control, and responsibility for the message conveyed and where the message conveyed is part of an overall regulatory scheme which advances a substantial governmental interest.

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